IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In Re:	)	
	)	
ROBERT AND JUSTINE SCHULT,	)	Case No. 98-33172
	)	
Debtors,	)	Chapter 13
	)	
ROBERT AND JUSTINE SCHULT,	)	Adv. No. 98-3291
	)	
Movants,	)	
	)	
vs.	)	
	)	
PAYLATER AUTO SALES, INC.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

The debtors, Robert and Justine Schult, (Schults) have filed a Complaint to Compel Turnover and for Sanctions seeking to recover their automobile from creditor Paylater Auto Sales (Paylater). Paylater has filed an Objection to Confirmation and a Motion to Dismiss. Paylater raised two bases for these pleadings. First, that this court has no jurisdiction over Paylater since there is no "claim" of Paylater that can be dealt with in the Schults' bankruptcy. Second, if the court has jurisdiction, the Schults filed their bankruptcy and plan in bad faith.

On June 24, 1998, The Schults filed a Chapter 7 bankruptcy. In that Chapter 7, the Schults requested a reaffirmation agreement on their 1990 Mercury Sable from Paylater Auto Sales. Paylater refused to sign a reaffirmation agreement. On October 7, 1998, the Court entered a discharge in Schults' Chapter 7. On October 8, 1998, Paylater repossessed the Sable.

On October 14, The Schults filed for Chapter 13 Bankruptcy. The Schults' Chapter 13 plan and schedules included Paylater Auto Sales as a secured creditor to be paid through the Chapter 13 Plan.

Paylater has a nonrecourse debt against the Schults. Paylater has a lien against their car but the Schults do not owe Paylater a debt personally. The personal debt to Paylater was discharged in the

Schults' prior Chapter 7 bankruptcy. Paylater does not want to get paid through the bankruptcy and instead wants to sell the car and apply that amount toward their lien on the car. The Schults are still the owners of the car.

The amount of Paylater's claim for the car as of October 1998, was $1,906.00. This is the amount on Paylater's invoice that was admitted into evidence as Exhibit A.

The Schults' [decision] to file a Chapter 13 was made at the end of their Chapter 7 bankruptcy when it appeared that a substantial debt would be declared non-dischargeable (Illinois Power) and that Paylater refused to sign a reaffirmation agreement.

Only one other creditor, Illinois Power, has objected to their treatment in this case. The Schults worked out a compromise with Illinois Power. Both parties are satisfied with this agreement.

The Chapter 13 Trustee filed a Recommendation to Confirm Original Chapter 13 Plan. This recommendation is part of the court's record in this case.

A creditor objecting to confirmation of a bankruptcy petition or filing a motion to dismiss has the initial burden of proof.[1] Paylater must produce evidence to support the allegations contained

[1] In re Shortridge, 65 F.3d 169, 1995 WL 518870 (6th Cir. 1995) ([I]t is generally accepted that a party objecting to confirmation bears the burden of proof"); Higher Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987) ("[g]enerally, in civil litigation, the party seeking to change the status quo has the ultimate burden of proving his allegations are true."); In re Love, 957 F.2d 1350,1355 (7th Cir. 1992) ("Dismissal for cause cannot mean that a debtor must show an absence of cause; it can only mean that the party moving for dismissal must demonstrate cause. (Citation-omitted.) As such, the burden was on the [movant] to show lack of good faith."); In re Blevins, 150 B.R 444, 446 (Bankr. W.D. Ark., 1992) ("Since a Chapter 13 plan that meets the requirements of section 1325(a) would be confirmed absent the objections of the creditor, the creditor has, at minimum, the initial burden of producing satisfactory evidence to support [its contention]..."); In re Mendenhall, 54 B.R. 44 (Bankr. W.D. Ark. 1985).

in its Objection and Motion. If Paylater had produced such evidence, then the burden to rebut that evidence would shift to the Schults.

The Schults have legal authority under the code and case law to include a lien on their property as a "claim" in their Chapter 13 bankruptcy. The bankruptcy court has jurisdiction over Paylater's lien on the Schults' automobile.

11 U.S.C. Section 102(2) states that a "'claim against the debtor' includes a claim against property of the debtor." The plain language of this statute indicates that if a creditor has a claim against the property of the debtor, then it has by extension, a claim against the debtor.

A lien on the Schults' automobile is equivalent to a "claim" against that automobile. There is no dispute that the Schults still have an ownership interest in the automobile. Therefore, the lien constitutes a claim against the property (automobile) of the Schults. Per Section 102(2), this constitutes a claim against the Schults.

Additional support is found at 11 U.S.C. Section 101(5) of the Bankruptcy Code. This section further defines "claim" as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured;

Paylater has a right to payment on the debt formerly owed personally by the Schults. Paylater's right to payment is enforceable only against the Schults' car. If not, they would have no claim to repossess the car from the Schults and sell it for the outstanding debt on the car. This constitutes a right to be paid that is secured under the plain language of the definition of a "claim" under 101(5)(A) above.

Paylater also has a "claim" under the plain language of 101(5)(B) since Paylater also has the right to an equitable remedy for breach of performance of the automobile contract, which is repossessing the Schults' automobile.

Paylater's lien on the Schults' car constitutes a "claim" using each the plain language of the definition of the word "claim" as found in sections 102(2), 101(5)(A) and 101(5)(B).

The dispositive case on this issue is Johnson vs. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed. 666 (1991). In this case, Debtor filed a prior Chapter 7 that eliminated personal responsibility for debt. The debt that was extinguished in the prior Chapter 7 was secured by a lien on the debtor's house. Debtor's listed the creditor's lien in the Chapter 13 as a claim and sought to modify the claim and cure the default in his subsequent Chapter 13 bankruptcy.

The Supreme Court addressed the definition of the word "claim" to be used in Section 1322 as follows:

> We have previously explained that Congress intended by this language to adopt the broadest available definition of "claim." (Citations omitted). In Davenport, we concluded that "'right to payment' [means] nothing more nor less than an enforceable obligation...." Johnson, 501 U.S. 78, 83, 111 S.Ct. 2150, 2154.
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> A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. See 11 U.S.C. § 727. However, such a discharge extinguishes only "the personal liability of the debtor." 11 U.S.C. § 524(a)(1). Codifying the rule of Long v. Bullard, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886), the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. Johnson, 501 U.S. 78, 82-83, 111 S.Ct. 2150, 2153.
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> ... we have no trouble concluding that a mortgage interest that survives the discharge of a debtor's personal liability is a "claim" within the terms of § 101(5). Even after the debtor's personal obligations have been extinguished, the mortgage holder still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an "enforceable obligation" of the debtor. Johnson, 501 U.S. 78, 84, 111 S.Ct. 2150, 2154.
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> In other words, the court must allow the claim if it is enforceable against either the debtor or his property. Thus, § 502(b)(1) contemplates circumstances in which a "claim," like the mortgage lien that passes through a Chapter 7 proceeding, may consist of nothing more than an obligation enforceable against the debtor's property. Similarly, § 102(2) establishes, as a "[r]ul[e] of construction," that the phrase "'claim against the debtor' includes claim against property of the debtor." A fair reading of § 102(2) is that a creditor who, like the Bank in this case, has a claim enforceable only against the debtor's property nonetheless has a "claim against the debtor" for purposes of the Code. Johnson, 501 U.S. 78, 85, 111 S.Ct. 2150, 2155.

The Supreme Court's determination is supported by In re Metz, 820 F.2d 1495 (9th Cir. 1987), In re Ligon, 97 B.R. 398. The Ligon court also stated that one of the main factors in determining good faith under the totality of the circumstances test was debtor's effort to reaffirm the debt in the previous Chapter 7 bankruptcy. Id at 405), (Bankr. N.D. Illinois 1989), Matter of Hagburg, 92 B.R. 809 (Bankr. W.D. Wis 1988), In re Lewis, 63 B.R. 90, 91 (Bankr. E.D. PA 1986). (The Lewis court also rejected a motion to dismiss based on bad faith), In re Lagasse, 66 B.R. 41, 43 (Bankr. D. Conn. 1986).

The difference between these cases and the instant case is the type of property at issue. The cases above deal with a lien on real estate and the instant case deals with a lien on an automobile. There is no difference in the code that differentiates between a lien on real estate and a lien on an automobile as to whether one or the other constitutes a "claim on debtor's property." Both are liens and claims against property of the debtor and therefore “claims” to be included and addressed under 11 U.S.C. § 1322(b) of the Bankruptcy Code.

> So long as a debtor meets the eligibility requirements for relief under Chapter 13, (Citation omitted) he may submit for the bankruptcy court's confirmation a plan that "modif[ies] the rights of holders of secured claims ... or ... unsecured claims," § 1322(b)(2), and that "provide[s] for the payment of all or any part of any [allowed] claim," § 1322(b)(6). Johnson 501 U.S. 78, 82, 111 S.Ct. 2150, 2153.

This court has jurisdiction over Paylater's lien. The Schults' Chapter 13 plan can and must deal with Paylater's claim. The next issue is whether the Schults' Chapter 13 plan and petition has been filed in good faith.

The standard of "good faith" raised in Paylater's Motion to Dismiss and Objection to Confirmation are arguably different. The "good faith" standard for a motion to dismiss is found in 11 U.S.C. § 1307 of the code, which allows dismissal of a petition for bankruptcy for "cause." The second "good faith" standard is for the confirmation of a Chapter 13 plan and is found at 11 U.S.C. Section 1325(a)(3). The Seventh Circuit has held however, that they are similar in several respects. Since the good faith standards for a chapter 13 petition and plan are both at issue, this court will apply all factors relevant to both determinations in this case.

> "... the same policy embodies the two good faith evaluations. (Citation omitted.) That is, one of the primary purposes of the good faith evaluation in both contexts is to "force[ ] the bankruptcy court to examine 'whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [the Chapter]....'" (Citation omitted.) At base, this inquiry often comes down to a question of whether the filing is fundamentally fair. See Schaitz, 913 F.2d at 453 ("the most fundamental and encompassing [factor when evaluating good faith] is whether the debtor has dealt fairly with his creditors.") In other words, the focus of the good faith inquiry under both Section 1307 and Section 1325 is often whether the filing is fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions." In re Love, 957 F.2d 1350, 1357 (7th Cir. 1992).

> "... Keeping in mind that the focus of the inquiry is fundamental fairness, the following nonexhaustive list exemplifies some of the factors that are relevant when determining if a Chapter 13 petition was filed in good faith: the nature of the debt including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors. Love, 957 F.2d at 1357.

Later in the opinion, the Seventh Circuit added an additional factor: "Granted, Section 1325(b) indicates that the application of disposable income to pay the debts can be pivotal to the confirmation of a Chapter 13 plan once there is an objection." Love, 957 F.2d at 1361.

The factors the Court should use to determine whether the Schults' bankruptcy and plan were filed in good faith should include:

(1) Whether their disposable income was included in their plan to pay their debts;
(2) The nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding;
(3) the timing of the petition;
(4) how the debt arose;
(5) the debtor's motive in filing the petition;
(6) how the debtor's actions affected creditors;
(7) the debtor's treatment of creditors both before and after the petition was filed; and
(8) whether the debtor has been forthcoming with the bankruptcy court and the creditors.

(1) Disposable income.

A review of the Schults' plan and schedules indicate that they have no disposable income. However, they are current on their plan payments even though on paper they are infeasible. This is

indicative of "good faith" because they are stretching and skimping on their necessities in order to make their regular plan payments.

(2) The nature of the debt/would the debt would be nondischargeable in a Chapter 7.

The debt sought to be included in the Schults' Chapter 13 is an automobile debt. The Schults' personal liability was previously discharged in their Chapter 7. This is a perfectly acceptable debt to include in a Chapter 13.

(3) The timing of the petition.

Paylater raises the point that this Chapter 13 was filed immediately after the Chapter 7 discharge. Paylater argues that this is indicative of the fact that they filed in bad faith.[2]

The fact that the Schults have filed a Chapter 13 immediately after their Chapter 7 is not a per se indication of bad faith. The Supreme Court rejected this argument.

> Serial filings under Chapter 7 and Chapter 13, respondent maintains, evade the limits that Congress intended to place on these remedies. We disagree. Congress has expressly prohibited various forms of serial filings. See, e.g., 11 U.S.C. § 109(g) (no filings within 180 days of dismissal); § 727(a)(8) (no Chapter 7 filing within six years of a Chapter 7 or Chapter 11 filing); § 727(a)(9) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing). The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief. Cf. United States v. Smith, 499 U.S. 160, 167, 111 S.Ct. 1180, 1185, 113 L.Ed.2d 134 (1991) (expressly enumerated exceptions presumed to be exclusive). Johnson, 501 U.S. 78, 87, 111 S.Ct. 2150, 2156.

Also, the Seventh Circuit has stated that with the amendments to the Bankruptcy Code in 1984, this factor should be given a smaller importance.

> For example, 11 U.S.C. § 109(g)(2) now specifically forbids a debtor in certain circumstances from refiling for bankruptcy within 180 days of a voluntary dismissal of a previous bankruptcy case. § 109 thus reduces in importance the need to evaluate repetitive filings as indicative of a lack of good faith, Easley,

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[2]Paylater also points out that the Schults filed a Chapter 7 in 1989. This should be given minor significance since the Schults did not refile another bankruptcy for nine years later which is expressly permitted under the Bankruptcy Code.

supra, 72 B.R. at 950; In Re March, supra n. 3, 83 B.R. 270, 274 (Bankr. E.D. Pa. 1988). In re Smith, 848 F.2d 813, 820 (7th Cir. 1988).

This is supported by the Ninth Circuit as well. In re Metz, 820 F.2d 1495 (9th Cir. 1987). In this case, the debtor filed a Chapter 7 followed by two successive Chapter 13 bankruptcies filed immediately thereafter. "Successive filing of bankruptcy petitions does not constitute bad faith per se." Id at 1497.

The Schults did not intend to file their Chapter 13 plan when they filed their Chapter 7 as a conspiracy or plan to abuse the terms of the bankruptcy code. The determination to file a Chapter 13 was made at the end of their Chapter 7 bankruptcy when it appears that a substantial debt would be declared non-dischargeable (Illinois Power) and that Paylater refused to sign a reaffirmation agreement. These are legitimate reasons to then file a Chapter 13 to deal with unanticipated situations after their Chapter 7 was completed.

(4) How the debt arose.

This is a standard debt arising from the purchase of a vehicle. The vehicle was given as security for the debt. The Schults did not incur this debt in any wrongful manner.

(5) The debtor's motive in filing the petition.

As stated above, the Schults are attempting to deal with unforeseen circumstances when they filed their original Chapter 7.[3] This is not prohibited by the Code.

The Schults need their automobile so Ms. Schult can have transportation to find work and keep her job. Also, the Schults have two small children, ages eight and six. With only one automobile, it is difficult and even potentially dangerous for one parent not to have transportation.

(6) How the debtor's actions affected creditors and

(7) the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

The Schults' Chapter 13 bankruptcy is eminently fair with the Schults' creditors. Take

[3]These debts would be the debt to Illinois Power, which has been resolved by the parties to pay Illinois Power a substantial portion of its debt in the Chapter 13. The other unresolved debt is Paylater's lien on the Schults' automobile.

Paylater's debt as an example.[4]

Under the Schults' Chapter 13 plan, Paylater will receive the entire amount owed (even unsecured debt). The entire debt owed to Paylater as of October 1998 was $1,906.00.[5] The secured portion of the debt to Paylater is listed as $1,500.00 in the Schults' plan. Paylater is scheduled to receive the value of the vehicle, $1,572.00 per NADA value, at 9% interest over the five year period of the Schults' Chapter 13 bankruptcy. This totals $1,958.08 over the five year period. Also, Paylater is scheduled to receive at least 10% of its unsecured claim (scheduled by Schults as $728.00) which would amount to an additional $72.80. At the end of the Schults' Chapter 13 bankruptcy plan, Paylater will receive a total of $2,030.58. This is well over their claim of $1,906.00. This is direct evidence that the Schults filed their plan in good faith of trying to pay their creditors what was owed.

Further evidence of the Schults' good faith is their attempt to reaffirm this debt with Paylater. Paylater refused to sign the reaffirmation agreement.

The Schults have been completely forthright in the information forwarded to the court and their creditors. As a matter of fact, the Schults overestimated the amount owed both to Illinois Power and Paylater in their schedules.

Paylater claims that the Schults' Chapter 13 case is unfair because Paylater is prevented from selling the car and getting their money out of the car. However, Paylater's argument is directly controverted by their invoice to the Schults' following their Chapter 7 discharge. That invoice indicates an intent by Paylater to allow the Schults to keep the automobile on Paylater's terms. Paylater is complaining not because it will receive payments or because the Schults will receive the automobile back, but because Paylater will not receive its money on its schedule. This is not a valid objection and a valid reason to find that a chapter 13

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[4]Only one other creditor, Illinois Power, has objected to their treatment in this case. The Schults worked out a compromise with Illinois Power. Both parties are satisfied with this agreement. This demonstrates the Schults' intention to deal with their creditors in good faith.

[5]This is an admission found on Paylater's invoice admitted into evidence before the court. (Exhibit 1)

plan is filed in bad faith.

Other evidence of the good faith of the Schults' Chapter 13 bankruptcy is the Chapter 13 Trustee's Recommendation to Confirm Original Chapter 13 Plan. This recommendation is part of the court's record in this case. If the Schults' plan was not proposed in good faith, the trustee certainly would have objected.

The Schults have demonstrated that instead, they were faced with a difficult financial situation, which was not adequately remedied by their Chapter 7 bankruptcy. It was impossible to foresee that Paylater would refuse to sign the reaffirmation agreement they offered in their Chapter 7 or that certain debt would not be discharged.

The Schults did not anticipate having to file a Chapter 13 when they filed their original Chapter 7. However, after certain events unfolded in the Chapter 7, the Schults filed their Chapter 13 to handle these debts while trying to get back on their feet. A finding of bad faith would penalize the Schults for attempting to use legal means to get back on their feet.[6]

After analyzing the factors set forth above, the Schults' Chapter 13 bankruptcy and plan is filed in good faith.

Paylater did not meet its burden in proving that the Schults' bankruptcy petition and plan were filed in bad faith. However, even though they do not bear the initial burden, the Schults have shown that the petition and plan were filed in good faith.[7]

The Schults have demonstrated that the bankruptcy code allows successive filings of bankruptcies. A creditor that holds a lien on debtor's property constitutes a "claim" which can be added in a Chapter 13 bankruptcy plan. The Schults have demonstrated that they filed their Chapter 13 bankruptcy petition and plan in "good faith." Paylater has not met its burden to prove that the petition and plan were not filed in

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[6]Most times a debtor will gain significant relief from one bankruptcy filing. However, when unforeseen circumstances arise, a second bankruptcy is necessary to allow citizens the “fresh start” bankruptcy provides. Such is the case here.

[7]Also, the fact that the trustee has filed a favorable report is sufficient evidence of good faith of the debtor. "If the statute imposes any affirmative burden of showing good faith upon the debtor, it was satisfied by the report of the standing trustee." In re Hines, 723 F.2d, 333, 334 (3rd Cir. 1983; In re Mendenhall, 54 B.R. 44, 46 (Bankr. W.D. Ark. 1985).

good faith.

The Schults' Complaint to Compel Turnover and Sanctions is granted. Paylater Auto Sales is ordered to turnover to the Schults their 1990 Mercury Sable within 14 days of the entry of this Opinion and Order. Paylater Auto Sales' Motion to Dismiss is hereby denied and its Objection to Confirmation is overruled.

SO ORDERED:

/s/ ANTHONY J. METZ
United States Bankruptcy Judge

ENTERED this 27TH day of April, 1999.